Supreme Court, U.S.
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No. 95-565

# In the Supreme Court of the United States

OCTOBER TERM, 1995

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RESTLAND FUNERAL HOME, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

## QUESTION PRESENTED

Whether the Attorney General is authorized to initiate a suit for a civil penalty under the Federal Trade Commission Act more than 45 days after receiving notification from the Federal Trade Commission pursuant to 15 U.S.C. 56(a)(1).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 51 F.3d 56. The opinion of the district court (Pet. App. D1-D6) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 2, 1995. A petition for rehearing was denied on July 6, 1995. Pet. App. B1. The petition for a writ of certiorari was filed on October 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Attorney General is entrusted with general statutory authority to conduct litigation on behalf of the United States and its agencies, except where other provisions of law vest that authority in different officials. Thus, 28 U.S.C. 516 provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." See also 28 U.S.C. 519;[1] *Federal Election Commission* v. *NRA Political Victory Fund*, 115 S. Ct. 537, 540 n.1 (1994).

2. The Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, establishes the Federal Trade Commission (FTC or Commission) and prohibits a variety of unfair and deceptive trade practices. The Act authorizes the government to file actions for civil penalties for knowing violations of the Commission's rules, 15 U.S.C. 45m, or for injunctive relief, 15 U.S.C. 53(b). The statute also addresses the division of litigating authority between the Attorney General and the Commission's own attorneys. With respect to actions for civil penalties, the statute provides:

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[1] Section 519 states that

> [e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

> (a)(1) Except as otherwise provided in paragraph (2) or (3), if—
>
> > (A) before commencing, defending, or intervening in, any civil action involving this subchapter (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and
> >
> > (B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;
>
> the Commission may commence, defend, or intervene in, and supervise the litigation [of], such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose[.]

15 U.S.C. 56(a)(1).[2] With respect to suits for injunctive relief, the statute provides that "the Commission

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[2] The current Section 56(a)(1) had its genesis in the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, § 204(a), 88 Stat. 2199. Before 1973, the FTC Act provided that where the Commission concluded that a person, partnership, or corporation was liable for a civil penalty, the Commission "shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought." 15 U.S.C. 56 (1970). Between 1973 and 1975, the Commission had limited independent authority to bring civil penalty actions for

shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so." 15 U.S.C. 56(a)(2). Subsection 56(a) further provides that "[t]he provisions of this subsection shall apply notwithstanding chapter 31 of title 28 [which includes 28 U.S.C. 516 and 519], or any other provision of law." 15 U.S.C. 56(a)(5).

3. Petitioners are five funeral homes located in Texas. On August 22, 1991, the Commission gave the Attorney General written notification of a contemplated suit against petitioners. Pet. App. A2. On December 3, 1991, the United States, through the Attorney General, filed suit against petitioners, alleging several thousand violations of a Commission regulation governing the funeral industry. *Ibid.*; *id.* at D1; see 16 C.F.R. 453. The government sought both civil penalties and injunctive relief under the FTC Act. Pet. App. D1; see 15 U.S.C. 45(m), 53(b). The complaint began with the statement that the suit was brought by "[p]laintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission." Pet. App. A3. Both the complaint and subsequent government filings listed one of the FTC's attorneys as "of counsel." *Id.* at A6.

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violations of its cease and desist orders. After the Commission gave the Attorney General written notification of the contemplated suit, the Attorney General had exclusive authority to bring suit within 10 days. Thereafter, the Commission could file suit on its own. See Act of November 16, 1973, Pub. L. No. 93-153, Tit. IV, § 408, 87 Stat. 591-592.

The district court dismissed the suit for lack of jurisdiction. Pet. App. D1-D6. The district court ruled that "§ 56(a)(1)(B) divests the Attorney General of authority to commence suit unless he does so within 45 days after receipt of the notification from the FTC provided by § 56(a)(1)(A)." *Id.* at D3. Relying principally on *United States* v. *St. Regis Paper Co.*, 355 F.2d 688 (2d Cir. 1966), the court stated that "the FTC alone is empowered to develop the enforcement policy best calculated to achieve the ends contemplated by Congress," and that "Section 56 was designed to prevent a 'dual system of surveillance and enforcement' involving both the FTC and the Attorney General." Pet. App. D4.

3. The court of appeals reversed. Pet. App. A1-A7. In the view of the court of appeals, Section 56(a)(1) "gives the FTC the post-45-day-period-ability to monitor the litigation, without regard to whether suit is filed by the FTC or by the Attorney General." Pet. App. A5. The court held that Section 56(a)(1) "does not prohibit the Attorney General from commencing litigation under the FTC Act after the statute's 45-day period, as long as the Attorney General's action is not in derogation of the rights granted to the FTC." Pet. App. A7. "In the instant case," the court concluded, "the Attorney General has not filed this action in contravention of the FTC's [Section 56(a)(1)] rights." *Ibid.* The court noted that "[t]he instant complaint states that notification and authorization were given *to* the Attorney General *by* the FTC." *Id.* at A6.

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court. Further review is not warranted.

1. Consistent with 28 U.S.C. 516 and 519, the FTC Act preserves the Attorney General's exclusive authority to bring actions for civil penalties for the first 45 days after the FTC has provided the Attorney General with written notification of the contemplated suit. Section 56(a)(1), by permitting the Commission to bring suit through its own attorneys after that 45-day period has expired, ensures that the FTC will be able to seek civil penalties even when the Attorney General does not file a suit. In that respect Section 56(a)(1) establishes a limited exception to the *exclusivity* of the Attorney General's authority to conduct litigation on behalf of federal agencies.[3] Section 56(a)(1) does not, however, purport to prevent the Attorney General from filing suit when the 45-day period has elapsed, particularly in cases (such as this one) where the Attorney General acts pursuant to the

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[3] Section 56(a)(2) establishes a more substantial exception to the general rule, providing that with respect to certain categories of lawsuits (including suits for injunctive relief, see 15 U.S.C. 53(b), 56(a)(2)(A)), "the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so." 15 U.S.C. 56(a)(2). Petitioners do not contend that Section 56(a)(2) barred the Attorney General from seeking injunctive relief in this case. No such claim would be plausible since, as the complaint in this case made clear, the Attorney General was authorized by the Commission to conduct the litigation and did so with the active assistance of FTC counsel. See Pet. App. A6-A7.

authorization of the Commission and with the active assistance of FTC counsel.

There is no basis for petitioners' claim (Pet. 27-29) that various provisions of Section 56(a) will be rendered superfluous if the Attorney General is permitted to file suit in this setting. Section 56(a)(1) grants the FTC additional and concurrent litigating authority—authority it would not otherwise have—to commence a civil penalty action if the Attorney General does not bring suit within the 45-day period after the notification and consultation requirements have been satisfied. Section 56(a)(5) makes clear that no other provision of law—such as 28 U.S.C. 516 or 519—should be read to supersede the grant of litigating authority given to the Commission in the other provisions of Section 56(a). Section 56(a)(4) provides that the Attorney General will have fewer than 45 days to assert exclusive control over the litigation in situations where the operation of a procedural rule threatens to extinguish the Commission's rights if prompt action is not taken. Thus, all three provisions serve to ensure, *inter alia*, that the Commission may seek civil penalties through its own counsel even when the Attorney General fails or refuses to do so. Recognition of the Attorney General's continuing authority to seek civil penalties where the initial 45-day period has elapsed does not render any of those provisions superfluous.

2. The legislative history of the 1975 FTC Act amendments provides no support for petitioners' position. The House and Senate Reports say nothing about the language ultimately included in current Section 56(a)(1), since the bills reported by the House and Senate committees contained provisions concerning litigation authority that were markedly

different from the provision finally enacted.[4] The Conference Report briefly summarizes the amendments to Section 56 but does not address the Attorney General's power to file a civil penalty action after the expiration of the 45-day period described in Section 56(a)(1)(A) where the Commission has not exercised its authority to conduct the action through its own attorneys. See S. Conf. Rep. No. 1408, 93d Cong., 2d Sess. 37-38 (1974).[5] The floor statements on which petitioners rely (see Pet. 26-27) do not declare that the Attorney General is divested of litigation author-

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[4] The bill reported by the Senate Committee would have authorized the Commission "to appear in its own name by any of its attorneys designated by it for such purpose" in "any civil proceeding involving [the FTC] Act." S. Rep. No. 151, 93d Cong., 1st Sess. 42 (1973); see also *id.* at 29 (bill "insures that the Commission will be able to represent itself in any civil proceeding involving the Federal Trade Commission Act"). The bill reported by the House Committee, by contrast, would have permitted the Commission to litigate on its own behalf only "with the concurrence of the Attorney General." H.R. Rep. No. 1107, 93d Cong., 2d Sess. 77 (1974) (emphasis omitted) (*House Report*). Petitioners' reliance (see Pet. 24-25) on the House Report is thus particularly misplaced; in fact, the passage quoted by petitioners (Pet. 24) quite plainly referred to the perceived need for centralized control of government litigation *by the Attorney General*. See *House Report* at 52.

[5] Section 56(a) of course establishes significant exceptions to the exclusivity of the Attorney General's usual role, by permitting the Commission to file civil penalty actions through its own attorneys after the initial 45-day period has elapsed and by granting the Commission exclusive authority (in Section 56(a)(2)) to conduct its own litigation in certain other categories of cases. Cf. Pet. 26 n.7. But neither the existence of those exceptions nor the conference committee's explanation of them suggests that the Attorney General is wholly prohibited from seeking civil penalties after the 45-day period expires.

ity after 45 days; their focus is on assuring that the FTC gains litigating authority after the 45-day period elapses.

3. The decision of the court of appeals does not conflict with any decision of this Court or any other court. Indeed, no other published decision has addressed the issue of statutory construction presented in this case.[6] The three cases on which petitioners primarily rely (see Pet. 14-23) are inapposite.

*United States* v. *St. Regis Paper Co.*, 355 F.2d 688 (2d Cir. 1966), was decided under the predecessor version of 15 U.S.C. 56(a)(1). At that time the statute provided that where the Commission concluded that a person, partnership, or corporation was liable for a civil penalty, the Commission "shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought." 15 U.S.C. 56 (1964); see note 2, *supra*. The court of appeals in *St. Regis Paper* held that the Commission's certification constituted a condition precedent to the Attorney General's filing of the suit. 355 F.2d at 693-700. The Second Circuit thus construed former Section 56 as entrusting solely to the FTC the initial determination whether a civil penalty action was warranted. *St. Regis Paper* did not address the proper construction of the current Section 56(a)(1) (which was not added to the statute until 1975) or the significance of the 45-day period described therein; it has no bearing on the question of

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[6] One unpublished district court decision has "adopt[ed] the reasoning and holding of the Fifth Circuit" in the instant case in concluding that the Attorney General was not barred from filing suit more than 45 days after receiving notification from the FTC. *In re Dahlberg and the Federal Trade Commission*, 1995-2 Trade Cas. (CCH) ¶ 71,117 (D. Minn. May 31, 1995).

which attorneys are to conduct the litigation; and it casts no doubt on the civil penalty action in the instant case, which was filed by the Attorney General pursuant to the notification and authorization of the FTC. See Pet. App. A6 n.3.[7]

*Top Value Meats, Inc.* v. *FTC*, 586 F.2d 1275 (8th Cir. 1978), also addressed an issue different from the one presented here. The court in *Top Value Meats* held that the Commission may assert civil penalty violations via counterclaims only through the procedure set forth in Section 56(a)(1)—*i.e.*, it must provide written notification of the contemplated action, consult with the Attorney General, and allow the Attorney General 45 days in which to file the counterclaim. 586 F.2d at 1281-1283. The decision did not address whether the Attorney General retains the authority to file suit (or to bring a counterclaim) more than 45 days after receiving notification from the FTC.

Finally, *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972) (see Pet. 22-23), is irrelevant to the proper resolution of the question presented here.

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[7] Petitioners' reliance (see Pet. 18) on *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 437-438 (2d Cir. 1974), is similarly misplaced. There, the Second Circuit relied on *St. Regis Paper* in declaring that the Attorney General could not increase an amount of penalties requested by the FTC's original referral. *Ibid.* The court of appeals reasoned that the FTC's referral authority included the power to determine what penalties should be sought. *Ibid.* *J.B. Williams* (which also involved a predecessor version of the current Section 56(a)) does not stand for any broader proposition. In any event, that aspect of the court's opinion was plainly dicta, since the court held that the amount of penalties sought was improper because the two corporate defendants should be treated as one entity. *Id.* at 436-437.

*S&E Contractors* held that 28 U.S.C. 516 and 519 do not provide a basis for a government appeal of an unfavorable administrative decision regarding a contract claim under the Wunderlich Act. 406 U.S. at 12-13. In the present case, by contrast, the FTC Act unambiguously provides a cause of action and confers jurisdiction upon the federal courts. See 15 U.S.C. 45(m), 53(b). Petitioners do not argue to the contrary, but simply assert that the wrong federal official initiated the suit. *S&E Contractors* has no bearing on the question of litigation authority where statutory provisions other than 28 U.S.C. 516 and 519 are acknowledged to confer federal jurisdiction and provide a cause of action.[8]

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[8] The coordinate litigation authority established by the FTC Act is not unique to that statute. Compare, *e.g.*, 47 U.S.C. 402(a) (Federal Communications Act); 7 U.S.C. 210(e), 217(a) (Agriculture); 42 U.S.C. 3612 (Fair Housing Act); Title 46, Chapters 23, 23A (federal maritime statutes); 42 U.S.C. 2239(b) (Atomic Energy Act). There is no basis, moreover, for petitioners' suggestion (Pet. 23) that their proposed construction of the FTC Act is necessary to "prevent[] confusion and protect[] businesses from unwarranted dual enforcement and bureaucratic oversight." Petitioners have identified no case in which the FTC and the Attorney General have subjected a defendant to conflicting or duplicative litigation or enforcement efforts in their joint administration of the statute. The Commission and the Attorney General, through her attorneys at the Department of Justice, have litigated cases under the current Section 56 for 20 years. On numerous occasions—as here—the Attorney General, without objection by the FTC, has filed suit more than 45 days after receiving an FTC referral. On other occasions, the FTC has exercised its authority to bring a case where the Attorney General has declined to do so within 45 days.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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